MOTION FILED
OCT 26 1992

(4) (4)

Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*
v.
TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, *Respondent.*

STATE OF OHIO, *Petitioner,*
v.
JAMES MAY, JR., et al., *Respondents.*

STATE OF OHIO, *Petitioner,*
v.
CLANCY VAN GUNDY, et al., *Respondents.*

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Chicago Lawyers' Committee") moves this Court for leave to file the attached brief *amicus curiae* in support of the petitions for writs of certiorari. The written consent of petitioner State of Wisconsin and respondent Todd Mitchell in no. 92-515 has been obtained and filed with the Clerk of this Court. The written consent of petitioner State of Ohio and respondents David Wyant and Robert Blazer in no. 92-568 has been obtained and filed with the Clerk of this Court. The written consent of the remaining respondents in no. 92-568 has been requested but not obtained.

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims. Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned.

The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois. Accordingly, the Chicago Lawyers' Committee requests that this Court grant it leave to file the attached brief *amicus curiae* supporting the petitions for writs of certiorari.

Respectfully submitted,

/s/ Frederick J. Sperling

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BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims.

Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned. The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois.

REASONS FOR GRANTING THE WRITS

I. The Decisions of the Wisconsin and Ohio Supreme Courts Are Inconsistent with Two Recent Decisions of This Court.

The Wisconsin and Ohio Supreme Courts struck down their respective states' bias violence statutes on the grounds that they violated the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992); *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). But the First Amendment is not even implicated in, much less violated by, the Wisconsin and Ohio bias violence statutes.

The Wisconsin statute authorizes the imposition of increased maximum penalties if the person committing the crime "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ." Wis. Stat § 939.645(1)(b). The Ohio bias violence statute enhances the penalty for a person who commits a crime "by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code § 2927.12. In both statutes, discriminatory selection of the victim—selection based on the victim's status—is the essential element of the crimes. In neither statute is expression—either speech or expressive conduct—an element of the crime at all.

The decisions of the Wisconsin and Ohio Supreme Courts are directly contrary to this Court's decision last term in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). In *R.A.V.*, this Court clearly stated: "When a government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. The St. Paul, Minnesota

ordinance at issue in *R.A.V.* was, by its terms, directed at the content of expression. Indeed, it regulated expression based upon the viewpoint contained in the message. In contrast, both the Wisconsin and the Ohio statutes regulate conduct without regard to expression. At most, any impact on speech is incidental. And clearly "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The Wisconsin and Ohio bias violence statutes do not in any way restrict the ability of a person to believe anything or to hate anyone; they simply punish committing a crime against someone because of that person's status.

The decisions of the Wisconsin and Ohio Supreme Courts are also inconsistent with this Court's decision last term in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, this Court clearly held that the Constitution does not preclude the admission of relevant evidence "concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. *See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding admission of evidence of racial animus in capital sentencing proceeding). There is no logical or legal basis for allowing a judge or jury to consider discriminatory victim selection in determining the imposition of criminal penalties while forbidding a legislature from doing so.

In short, the decisions of the Wisconsin and Ohio Supreme Courts are based on a seriously erroneous reading of the limits imposed by the First Amendment and are inconsistent with this Court's recent decisions in *R.A.V.* and *Dawson*.

II. The Decisions of the Wisconsin and Ohio Supreme Courts, If Followed, Would Erroneously Invalidate All Other Bias Violence Statutes in This Nation and Call Into Question the Validity of Federal and State Antidiscrimination Statutes.

Nearly every state in this nation has enacted some form of bias violence statute. Anti-Defamation League of B'nai B'rith, *ADL Law Report, Hate Crimes Statutes: A 1991 Status Report* 22-23. Moreover, many states (including Wisconsin, Ohio, and Illinois) provide victims of bias violence with a civil remedy. *Id.* The decisions of the Wisconsin and Ohio Supreme Courts striking down their respective states' bias violence statutes are so broad that, if followed, they would invalidate all other bias violence statutes in this nation.

In addition, the operative language of both federal and state antidiscrimination statutes is the same as or substantially similar to the operative language in the Wisconsin and Ohio bias violence statutes. Because there is no principled distinction between antidiscrimination statutes and the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, these decisions call into question the validity of antidiscrimination laws throughout our nation.

III. There Is a Conflict Between State Courts of Last Resort Concerning the Constitutionality of Bias Violence Statutes.

The Oregon Supreme Court has upheld the constitutionality of Oregon's bias violence statute, specifically rejecting the reasoning adopted by a majority of the Wisconsin Supreme Court in *Mitchell. State v. Plowman*, 314 Or. 157, 1992 WL 207677 (August 27, 1992). The different results reached by the Wisconsin and Ohio Supreme Courts

on the one hand and by the Oregon Supreme Court on the other appear to be based on their differing readings of this Court's decision last term in *R.A.V.* Because of the importance of the issues involved, this Court should resolve the conflict.

CONCLUSION

Nothing threatens to unravel the fabric of our heterogeneous society more than violence directed at persons because of immutable characteristics such as their race or religion. Yet, under the mistaken belief that the First Amendment prevents the states from providing a remedy for bias violence, the Wisconsin and Ohio Supreme Courts have struck down statutes that provide such a remedy. This Court should grant the petitions for writs of certiorari to make clear that the First Amendment does not bar the states from providing a remedy for bias violence.

Respectfully submitted,

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